COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.00 PER ANNUM. 30 CENTS PER NUMBER

NOTES.

SPECIFIC PERFORMANCE OF NEGATIVE COVENANTS.—Should a negative contract be enforced solely because it is such, or should the ordinary rule of inadequacy of legal remedy apply? Though the authorities are in apparent conflict, those holding that such a contract is inherently subject to specific performance are either dicta, *Kimberly* v. *Jennings* (Eng. 1836) 6 Sim. 340, or when considered upon their facts an actual inadequacy of legal remedy will be found. *Whittaker* v. *Howe* (Eng. 1841) 3 Beav. 383. A recent case in Illinois, however, raises the question squarely by denying that inadequacy of legal remedy determines the jurisdiction of equity in these contracts. *Andrews* v. *Kingsbury* (Ill. 1904) 72 N. E. 11.

When equity takes jurisdiction over contracts it is in its concurrent or supplemental jurisdiction, Fry on Specific Performance, 3rd ed., § 22, the ordinary remedy being damages for breach of contract. Fry, supra, §§ 41, 44. When a negative contract is broken there is usually a substantial pecuniary loss, and the plaintiff is entitled to reimbursement. If the breach is final the injury is frequently inflicted to a going business, where it would be impossible to measure the damages without speculation, and the remedy in equity would be fully justified; *Williams* v. *Montgomery* (1896) 148 N. Y. 519; *Finley* v. *Aiken* (Pa. 1854) 1 Grant's Cas. 83; but where the damages can be definitely proved no case has been found in which equity has taken jurisdiction. See Fry, supra, § 51. In the case of continuing covenants there are two lines of decisions. Some courts require that all damages, present and prospective, be assessed in one action; *Tippin* v. *Ward* (1875) 5 Ore. 450; *Shaffer* v. *Lee* (1850) 8 Barb. 412; *Ennis* v. *Buckeye Pub. Co.* (1890) 44 Minn. 105; and in these cases it seems equally clear

that the damages would be so speculative as to give equity jurisdiction. Other courts require that successive suits be brought for each accruing injury, *Terry* v. *Beatrice Starch Co.* (1895) 43 Neb. 866; *Hunt* v. *Tibbetts* (1879) 70 Me. 221, and here the jurisdiction could be sustained to avoid multiplicity of actions. *Shimer* v. *Morris Canal Co.* (1876) 27 N. J. Eq. 364; *Penn. Coal Co.* v. *Del. Canal Co.* (1865) 31 N. Y. 91. It would seem therefore that where actual damages are suffered equity will take jurisdiction, not because the contract is negative, but because of the inadequacy of legal remedy. In the principal case, however, the defendant offered to prove that there had been no actual financial loss. In such a case the plaintiff in law would be entitled to a judgment for nominal damages, Sedgwick on Damages, 8th ed. § 98; *Deere* v. *Lewis* (1869) 51 Ill. 254, and as such a judgment will not prevent a suit for subsequent actual damages, Sedgwick, supra, § 642, the legal remedy would seem amply adequate, and equitable jurisdiction would have to rest on a ground peculiar to these cases.

Where real estate is involved, equity takes jurisdiction regardless of the question of damages. Fry, supra, p. 13, note; *Hodges* v. *Kowing* (1889) 58 Conn. 12. There is little doubt, however, that when land is in dispute the unique nature of the subject-matter in a large majority of cases makes legal damages inadequate and speculative, and it would seem that even in this class of cases it is the imperfection of the legal remedy that gives the jurisdiction. Fry, supra, pp. 607 note, 34 note. It is hard to conceive of equity granting specific performance of a contract to convey land in a case where the complainant admitted that he bought the land only for speculation and that his only loss was a liquidated amount, due to a rise in the market value of the land. See *Richmond* v. *Railroad Co.* (1871) 33 Ia. 422; *Townsend* v. *Vanderwerker* (1891) 20 D. C. 197. Similarly, in uniliteral contracts containing a negative covenant it is said that the plaintiff should be entitled to specific performance of the promise because he has given a consideration; but the plaintiff's performance is valuable only to negative the lack of mutuality so frequently found in these cases, *Lindsay* v. *Warnock* (1894) 93 Ga. 619; *Welch* v. *Whelpley* (1886) 62 Mich. 15, and to give it a greater effect would seem to go too far. See 4 COLUMBIA LAW REVIEW 61. The principal case seems to go beyond any decided case, though it has the support of dicta in several decisions and follows an authoritative writer. Professor LANGDELL in 1 Harvard Law Rev. 383.

INCORPORATION OF RELIGIOUS SOCIETIES.—Though religious societies are usually denominated voluntary associations, statutes were early passed in most of the States providing for their incorporation, *Holt* v. *Downs* (1877) 58 N. H. 170, and at present a majority of the religious societies in this country conduct their affairs under a franchise. Ecclesiastical corporations ceased when the Constitution was adopted; *Turpin* v. *Locket* (Va. 1804) 6 Call 113; so that now religious corporations are not to be regarded as ecclesiastical is the sense of the English law, under which they were subject to ecclesiastical judicatories, but as belonging to the class of civil corporations, to be controlled by the ordinary rules of the common law. *Robertson* v. *Bullions* (1854) 11 N. Y. 243. Legislatures have shown no more hesitation in